Re: SB 708

Should Senate consider the final version of HB5002, this letter addresses a few absolutely necessary "tweaks."

EvansPortenga

Attorneys at Law

Thomas J. Evans

Roy J. Portenga

450 Morris Avenue
Suite 300
Muskegon, MI 49440

231-722-6000
Fax: 231-722-6464
1-800-225-5066

Holland Office
1-616-396-2618

November 1, 2011

Representative Holly Hughes
N-1195 House Office Building
P.O. Box 30014
Lansing, MI 48909
Facsimile: 517-373-9698

Representative Marcia Hovey-Wright
N-1196 House Office Building
P.O. Box 30014
Lansing, MI 48909
Facsimile: 517-373-9646

Representative Wayne A. Schmidt
Chair, House Commerce Committee
Anderson House Office Building
S-1388 House Office Building
Lansing, MI 48933
Facsimile: 517-373-9420

Representative Bradford Jacobsen
N-895 House Office Building
P.O. Box 30014
Lansing, MI 48909
Facsimile: 517-373-8574

RE: HB5002-Worker's Compensation

Dear Representatives Hughes, Hovey-Wright, Schmidt and Jacobsen:

First, Representatives Hughes, Hovey-Wright and Schmidt, despite extremely heavy schedules, in the past you have provided me with personal time to explain my opposition to HB5002. Representative Jacobson, your office provided me with the opportunity to have a 20 minute conversation with your very capable and professional legislative aide, Michael Compagnoni. To all of you, thank you.

Representative Schmidt, I attended three of your Commerce Committee Hearings on HB5002. I was also aware of meetings you helped arrange between the proponents and opponents of this bill in an effort to work out differences. You promised me (and fellow

attorneys who originally met with you) that you would not "ramrod" this bill through, i.e., you would permit debate and comments on both sides. You've kept your promise and for that you have my appreciation.

Now, the bill is on the House Floor. As I made clear with my card at each of the three Commerce Committee Hearings I attended, I oppose the bill. My gut feeling, however, is but for a few tweaks, this bill will pass the house. Therefore, I wish to emphasize the tweaks, more procedural than substantive, that I respectfully request you to offer as amendments.

1. DEFINITION OF DISABILITY

Section 301(5) lays out the requirements a Claimant must satisfy in order to prove disability. Subsections C and D (page 12, lines 18-26) state that if a person can do any of the jobs within his or her qualifications and training that pay maximum wages, he or she may still receive work comp if he or she shows a good faith---but unsuccessful---attempt to procure such a job. This language appropriately punishes the loafers and helps those who are trying to help themselves.

Please now go to Section 301(4)(A) on page 11, lines 12 through 17. Here, the new language states that a limitation "occurs only" if the employee is unable to perform "all" jobs paying the maximum wages in work suitable to the employee's qualifications and training. In short, this language states that where a person is able to do some, but not all of the work within their maximum wage earning capacity, they are not disabled---even if they are genuinely looking for jobs. This contradicts the before-mentioned language in Section 301(5).

The proponents of HB5002 indicate they are attempting to codify existing case law, i.e., particularly the Stokes decision. Stokes is consistent with 301(5), not the before-mentioned 301(4)(A) language. This contradiction will no doubt produce controversy and litigation. (I suspect what happened here is in the usual, last minute changes, the participants either did not notice the contradiction or simply forgot to strike the contradictory language.) I respectfully request that lines 12 through the word "skills" in line 17, page 11 be struck from the bill.

2. WAGE EARNING CAPACITY

Part of HB5002 which is so controversial (and will be so difficult for adjusters, lawyers on both sides, and magistrates to deal with) is the bill's pronouncement that those who are partially disabled (unable to do jobs within their maximum wage earning capacity but able to do lesser paying jobs) will have their weekly comp calculated as 80% of the after tax difference between the wages they were making at the time of their injury and their "wage earning capacity" post-injury. This is the "virtual wage" portion of the bill that has been so denounced. Specifically, Section 301(4)(B) defines "wage earning capacity" as:

> The wages the employee earns or is capable of earning at a job reasonably available to that employee, whether or not actually earned. For the purposes of establishing wage earning capacity an employee has an affirmative duty to seek work reasonably available to that employee. A magistrate may consider good faith job search efforts to determine whether jobs are reasonably available.

Obviously, the controversial language is "capable of earning at a job reasonably available, whether or not actually earned." As noted, this section states a magistrate "may" consider good faith job search efforts to determine whether jobs are reasonably available. Because HB5002 is designed to exclude the loafers and not harm injured workers who are really trying to help themselves, the word "may" in line 2, page 12, should be changed to the word "will".

Reducing work comp based on virtual wages is a procedural nightmare that will likely create overwhelming litigation (and thus overburden the work comp system), and will force injured employees to seek benefits from and thus overburden unemployment, state disability assistance, etc. Therefore, this section should simply end at the end of line 24, page 11 ("wage earning capacity means the wages the employee earns"). But if that can't be, my recommendation is to change the word "may" in line 2, page 12, to "will."

3. VOCATIONAL EXPERTS

Worker's Compensation is area of law that is cost heavy because, ultimately, medical depositions have to be taken even on the most routine of cases. Suffice it to say you can't believe how much the doctors require for their depositions. These are expenses **both** Plaintiffs and Defendants have to incur. Because HB5002 places so

much emphasize on jobs "within his or her qualifications and training that pay maximum wages", **both** Plaintiffs and Defendants have to resort to sending Claimants to their respective vocational experts who then draft reports and then get deposed. All this causes **both** sides to pay $1,200 to $2,000 more into the case. These costs are a burden to both sides and need to be eliminated. This can be done by simply adding a new subsection after subsection 301(5) and (6) (line 8 on page 13). The subsection could simply say, "when attempting to satisfy the requirements of paragraphs (5) and (6) above, vocational experts may not be used."

4. COMPANY DOCTOR

Section 315(1) of the existing law states that an injured employee has to treat with the company's doctor for the first 10 days after the inception of medical care (page 18 line 14). HB5002 changes this to 45 days. Americans (regardless of party) want people to be able to be free to make personal choices, admire and value competition, and want to go as quickly as possible to the best doctor possible (so that the condition heals and the injured employee can get back to work asap). I am stunned that HB5002 changes the 10 day rule to 45 days. I see no rational argument that can justify this change. This is not a Republican vs. Democrat issue. This is a "no brainer". If there has to be some give, I would recommend 21 days (a simple 3 week period).

5. SUMMARY

Again, you have all in one way or another already given me time to lay out my position. Now you've given me a little more time. Thank you. I'm sending a copy of this letter to Goeff Hansen (my Senator), Kevin Elsenheimer (Director, Workers Compensation Agency), and G. Jay Quist (Division Director, Employment Services) as these are individuals whom I've already discussed comp issues with and who are obviously interested in the issue.

Thank you for your time and consideration.

Sincerely,

Roy J. Portenga
/jas
Cc: Senator Goeff Hansen
Kevin Elsenheimer
Judge G. Jay Quist

October 14, 2011

Addresses What's Wrong with the Original Bill--- including SB 708

Honorable Wayne A. Schmidt
Chair, House Commerce Committee
Anderson House Office Building
S-1388 House Office Building
Lansing, MI 48933
Facsimile: 517-373-9420

RE: House Bill 5002

Dear Chairman Schmidt:

I had the opportunity to talk with you briefly in your office about the above-captioned bill in the past; I have also been at the past two HB 5002 Commerce Committee public hearings. I've submitted cards referencing my opposition to the bill and my desire to speak. I've just been advised the next public hearing is scheduled for 10/19/11 at 10:30 a.m. I'm on the Board of Trustees at Muskegon Community College and unfortunately our October public meeting conflicts with your hearing. Accordingly, I'm faxing what I would say if I had the opportunity. I'm also sending 30 copies of this letter via One-Day-Mail with the request that you please distribute them to your committee members.

THE HEART OF THE ISSUE

In listening to comments so far, I'm struck by the fact the supporters of the bill only emphasize the Trammel-specific loss issue and the "just cause discharge" issue as though these were the heart of the proposed act. They are not; these are marginal issues over which you will find little disagreement from the Plaintiff's Bar. The heart of the proposed law is found in the definition of disability as set forth in Section 301. You'll note the proponents have said little about Section 301---in my humble opinion, purposely so.

Please remember Workers' Compensation is a "system" that applies to approximately 4 million workers in the State of Michigan. The purpose of the Act is to get benefits to injured employees quickly so that they don't miss house payments, etc. Moreover, the Act was set up to give incentive to employers and employees alike to get the

employee back to work quickly. With this as background, I'll provide you with a brief, practical hypothetical and point out how the old law, the existing Sington/Stokes scenario, and HB 5002 handle the facts.

HYPOTHETICAL

Assume: 37-year old employee who works for a small town grocer as a warehouse worker/stocker where he's on his feet all day; has a high school education; is paid $12.00 per hour; has worked for the grocer many years; grocer genuinely likes the employee and the employee's family and is delighted to have him as an employee; employee very much likes and respects the grocer; 17 years before, the employee worked the best paying job he ever had---one year as a cab driver making $14.00 hour plus tips, a job he hated and quit. The employee is capable of working a Walmart sit/stand option greeter job down the street which pays $9.00 per hour.

A pallet of product shifts while the employee is moving it with a hand jack and heavy boxes fall onto and severely fracture his left leg. Employee's orthopedic surgeon says he has to do sit/stand option work for the next six weeks, a restriction that does not permit him to return to work for the grocer for the six weeks.

OLD LAW

At the last public hearing you heard a representative of the UAW who was involved in negotiating the 1987 definition of disability in the Act. The definition is found at Section 301(4) and states a disability means "a limitation of an

employee's wage earning capacity in work suitable to his or her qualifications and training resulting from a personal injury or work-related disease." Before the Sington v Chrysler Corp., 467 MI 144 (2002) case, work comp judges interpreted the law literally (as they should have) and in a way, per the UAW representative's testimony, consistent with the intentions of the parties.

Applying the disability definition to the above hypothetical, the employee had "a limitation" in his wage earning capacity (he could no longer perform his warehouse/stocking job). After initial insurance company paperwork is done, the employee would receive his first check within three weeks (paid retroactive back to his first day off) and he would receive benefits for the remainder of the six weeks; no house payments are missed.

SINGTON/STOKES

I won't go through all the steps that the Supreme Court requires injured employees and insurance adjusters to go through to establish disability for the six weeks at issue under the Sington/Stokes cases because it will take too long. Also, a complete analysis would require each side to hire vocational experts. It's that complicated (and that's why some changes to the Act are necessary).

HB 5002

According to HB 5002 Section 301(4)(A), the employee first has to establish his injury "results in the employee's being unable to perform **all** jobs paying the historical maximum wages in work suitable to that employee's qualifications and training including work that may be performed using the employee's transferrable work skills." In our hypothetical, the employee will receive **no** weekly work comp as he can still drive and thus can drive a taxi---a job which used to pay him $14.00 an hour. The employee cannot receive group disability benefits, even if the employer had such benefits, as those benefits only pay for non-work-related conditions. Employee misses one, maybe two house payments. Grocer is not happy as he paid premiums for work comp insurance and now his employee (and the employee's family), who he very much likes, suffers.

Assume for a moment the employee never worked as a taxi cab driver and that his best paying jobs to which his skills and qualifications transfer are all $12.00-an-hour jobs, including a $12.00-an-hour sit/stand cashier's job. Because he can do the sit/stand option cashier job, he gets no benefits. House payments, again, are missed.

Next, lets simply assume that the **only** job the employee's qualifications and training prepare him for are on-your-feet-all-day jobs which typically pay $12.00 per hour. So now, under Section 301(4)(A) he meets the first test of disability, i.e., the injury resulted in his "being unable to perform all jobs paying the historical maximum wages…." Now, the "virtual wage" issue comes into play. According to proposed Section 301(4)(A), "a disability is partial if the employee retains a wage earning capacity at a pay level less than his or her historical maximum wages in work suitable to his or her qualifications and training." Proposed Section 301(4)(B) then defines "wage earning capacity" as "the wages the employee earns or is capable of earning, whether or not actually earned."

In our hypothetical, the employee can still do a sit/stand option Walmart greeter job paying $9.00 per hour. So his disability is "partial."

Proposed Section 301(6) states that when a disability is partial, "the employer shall pay or cause to be paid to the injured employee…weekly compensation equal to 80% of the difference between the injured employee's after tax average weekly wage before the personal injury and the employee's wage earning capacity after the personal injury." Remember, wage earning capacity is defined as what the employee earns "or is capable of earning, whether or not

actually earned." So in our hypothetical, the insurance company only has to pay 80% of the after tax difference between a $12.00 an hour job and a $9.00 an hour job, roughly $80.00 per week. It's totally irrelevant whether the greeter job is available, whether the employee is in good faith applying for such jobs, etc. Bottom-line, house payments are missed.

IMPACT

As stated above, please remember Worker's Compensation is a "system" that serves around 4 million Michigan workers. The vast majority of claims are short, closed period claims that are handled by adjusters without the involvement of attorneys. The system, until Sington/Stokes, worked well. Was there some litigation? Yes; there are always a few grey-area cases. But most cases were handled without litigation, workers were promptly paid and went back to work, and house payments were made.

What happens under HB 5002, as noted above, is a sham; employers pay good money for worker's compensation insurance which ultimately doesn't pay much if any weekly benefits. Since there's no such thing as a "free injury", desperate employees under the above circumstances are going to file lawsuits, or file for State Disability Assistance (through DHS), or file for unemployment (he couldn't do his old job but he can do some work), etc. Already threatened mortgage companies (and all creditors) aren't going to appreciate missed payments.

SUMMARY

The heart of the proposed law is to change the definition of disability. There are Democrats and Republications amongst the Commerce Committee and the citizens they represent. While our two-party system forces us to emphasize our differences, let's be frank, on most issues we agree (that's why we can "live with" spouses, parents, and siblings of the other party!). Why? Because we all have a fundamental threshold of common sense and what we think is fair. HB 5002 goes below this threshold. I respectfully request the Commerce Committee to significantly alter HB 5002.

ALTERNATIVES

The law as it existed before Sington (2002) worked; it simply needs some tweaks. Another alternative is what was worked out and, I believe, submitted to you by the Worker's Compensation Section of the State Bar of Michigan (a group consisting of **both** Plaintiff and Defense attorneys).

Thank you for your kind consideration.

Sincerely,

Roy J. Portenga
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enclosures
